

J5FTSECC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 SECURITIES AND EXCHANGE
5 COMMISSION,

6 Plaintiff,
7 v.

18 CV 8175 (ER)

8 BARRY C. HONIG, et al.,

9 Defendants.

10 -----x

May 15, 2019
10:30 a.m.

11 Before:

HON. EDGARDO RAMOS,

District Judge

12 APPEARANCES

13 SECURITIES AND EXCHANGE COMMISSION

Attorneys for Plaintiff

14 BY: NANCY BROWN

KATHERINE BROMBERG

JON DANIELS

15 SIMPSON THACHER & BARTLETT

Attorneys for Defendant Honig

16 BY: ANAR PATEL

17 MILBANK

Attorneys for Defendant Stetson

18 BY: ADAM FEE

19 RICHARD & RICHARD

Attorneys for Defendant Brauser

20 BY: DENNIS RICHARD

21 ORRICK, HERRINGTON & SUTCLIFFE

Attorneys for Defendant O'Rourke

22 BY: GREGORY MORVILLO

23 NICOLE LLORET

24 COOLEY

Attorneys for Defendant Ladd

25 BY: RANDALL LEE

MICHAEL BERKOVITZ

J5FTSECC

(Case called)

THE COURT: Good morning to you all. This matter is on for an initial conference.

Ms. Brown, it's been a while since this was case filed, but why don't you give me, in a nutshell, what this case is about.

MS. BROWN: Well, your Honor, this case was filed, as you know, in September of 2018 against 20 defendants. It encompasses allegations of three pump and dumps with respect to three different companies. They are named as Company A, Company B, and Company C in the complaint, but I'm free to tell you that they are BioZone Pharmaceuticals, MGT Investments, and MabVax Therapeutics.

THE COURT: What's that third one?

MS. BROWN: MabVax, M-A-B-V-A-X.

And we allege that over a period between 2010 and 2016 the defendants engaged in schemes to inflate the price of the securities. They gained undisclosed control over companies, amassed millions of shares of securities, then engaged a promoter or promoters to publicize in a false and misleading way the rosy prospects of these issuers, and then cashed out when the price and the volume of the securities rose. And we allege that that happened five times, two with respect to MabVax, two with respect to MGT Investments, and one with respect to BioZone. We allege that they made millions of

J5FTSECC

1 dollars in these endeavors, and they violated numerous
2 provisions of the federal securities laws in doing so.

3 I think we're here today to talk about a discovery
4 schedule, and I'm happy to proceed there or give you more color
5 on the complaint. I can tell you the status of various
6 settlements if that --

7 THE COURT: Why don't you do that. More than half of
8 this case or half of the defendants are gone at this point,
9 right?

10 MS. BROWN: Either completely or partially. So we
11 have three defendants with whom we have entered into partial
12 settlements by which they have consented to the imposition of
13 injunctive relief, monetary relief remains. We will determine
14 that at a later point, usually at the end of the case,
15 hopefully on further consent and not for the motion practice.

16 We have also settled with numerous defendants
17 completely, so I think a total of nine out of the first 20 have
18 been settled either partially or completely. They include
19 Mr. Groussman and his company, Dr. Frost and his two companies,
20 and various associated entities.

21 So now we would like to move into discovery. We're
22 happy to do that. We have proposed a schedule, the defendants
23 have proposed a different schedule. Some of the defendants
24 agree with all of defendant Ladd's schedule and some do not.

25 THE COURT: As I understand it, everyone agrees that

J5FTSECC

1 April 1 of 2020 is the cut-off date, correct?

2 MS. BROWN: I believe actually defendant Ladd's last
3 proposal has an April 30 cut-off. I think the two main issues
4 for discussion this morning are the timing of written
5 discovery, by which I mean interrogatories and requests to
6 admit. The Commission believes after years of practice in this
7 area that those kinds of discovery should await the end of the
8 fact discovery period, and I'm happy to expand on that
9 position.

10 With respect to the other item that I think is up for
11 discussion is the postponement of the defendants' depositions.
12 The defendant Ladd's proposal has the defendants available for
13 deposition only in a three-week period at the end of fact
14 discovery, and we think that's inappropriate. We think that
15 the defendants' depositions should be available as soon as the
16 document discovery is completed, which we anticipate will
17 happen very, very soon, and we don't see any reason for delay.
18 And frankly, defendants have offered none except that they want
19 to be better educated about our case. I mean I understand that
20 position, but I don't think that's a reason to restrict the
21 depositions of the defendants.

22 THE COURT: Why is it that you want to hold off on
23 turning over documents until later, or is has that issue been
24 resolved?

25 MS. BROWN: I think that issue has been resolved. We

J5FTSECC

1 have agreed with defendant Ladd and defendant Brauser to
2 respond to their requests in 30 days from the issuance of those
3 requests, which is in May. So we will do that.

4 We had originally proposed, because the original
5 proposal required us to turn over documents at the same time we
6 were responding to motions to dismiss, and we simply proposed
7 what we thought was reasonable, which was to delay it until at
8 least our oppositions were filed.

9 Since that time Ladd and Brauser have both served
10 document requests, we have also served document requests, and
11 so we anticipate that that would go forward.

12 THE COURT: Okay. So I will hear from -- who
13 represents Mr. Ladd?

14 MR. LEE: I do, your Honor.

15 THE COURT: But before we get to that, I want to give
16 the defendants an opportunity to provide any additional color
17 that you want me to know at this time. You are under no
18 obligation to revisit anything, but if there's something that
19 you want to put on the record, I'm happy to hear you.

20 MR. FEE: No, thank you, your Honor.

21 THE COURT: Seeing none, Mr. Lee, why is it that you
22 want to -- well, what is your position on these various issues,
23 on written discovery and the documents?

24 MR. LEE: Thank you, your Honor. First, I am glad to
25 hear from the SEC. I think all the defendants are glad to hear

J5FTSECC

1 that the issue as to when requests for production can be
2 promulgated and when those documents can be produced has been
3 resolved. It has not been entirely clear what the SEC's
4 position is on that, so that's why the Court saw sort of
5 different positions taken up in our letters because there was a
6 lack of transparency from the SEC as to what their position was
7 actually going to be it, dispute numerous requests by us. And
8 that's why I think counsel for at least one of the other
9 parties has maintained the position that document discovery
10 should be deferred, but we believe, obviously, that there is no
11 reason to defer it.

12 On the issue of written discovery, it's our position
13 that given the complexity of the charges, the number of
14 charges, the number of different statutory provisions that the
15 SEC has cited, which exceeds something like 15 or 20 different
16 alleged statutory violations under various provisions of the
17 securities laws, a number of different players and parties, we
18 believe that written discovery requests, namely requests for
19 admissions and interrogatories, is an appropriate way to try to
20 identify what are truly the disputed issues, what are not, what
21 issues are not disputed, to try to sort of make a discovery
22 more streamlined.

23 That certainly applies to requests for admission and
24 fact-based interrogatories. With respect to contention
25 interrogatories, I think our position would be the same, that

J5FTSECC

1 it is a way of making discovery more streamlined and efficient,
2 given the nature of the charges.

3 I would also sort -- just to back up for a second, I
4 would like to clarify for the Court that the defendants in this
5 case sort of occupy different roles. There are a group of
6 defendants who are alleged to have been essentially the
7 orchestrators of the various alleged pump and dump schemes, and
8 then there were the defendants who were charged who are
9 officers of the companies that were allegedly the vehicles for
10 the pump and dump schemes.

11 Mr. Ladd, my client, is the CEO -- he is currently the
12 CEO of MGT Capital, which is a public company. The evidence
13 will show it is a longstanding, legitimate, public company with
14 legitimate business interests. And his role is solely with
15 respect to the allegation that he allowed his company
16 essentially -- he knowingly allowed his company to be used as
17 one of the vehicles for this pump and dump scheme. So I think
18 it is inaccurate to characterize him as a perpetrator of this
19 sort of broad manipulative scheme, as Ms. Brown has suggested.
20 So I just wanted to clarify for the Court that Mr. Ladd's
21 position, we submit, is the quite different from some of the
22 other defendants.

23 Finally, on the issue of depositions, it was not clear
24 to us that the SEC was proposing depositions to occur -- party
25 depositions only after the production of documents was

J5FTSECC

1 completed. Certainly we think that's appropriate. Our
2 proposal structuring and staging the case such that we have
3 document production, requests for admission and interrogatories
4 proceeding at the parties' discretion, everyone will have to
5 decide when they believe it is appropriate and useful to
6 promulgate those, to be followed by non-party depositions and
7 party depositions, at least in my experience is a perfectly
8 sort of logical and conventional way of making sure the
9 evidence has been produced and has been available to all
10 counsel and parties before party depositions start. That was
11 the simple reason for our proposal.

12 THE COURT: It certainly seems appropriate to hold off
13 on party depositions until all document and other productions
14 have been completed, but it sounded a little strange to me that
15 they would be confined to a three-week period fairly late in
16 the discovery schedule.

17 So given that the SEC has now agreed that document
18 production can begin immediately, I take it, Mr. Lee, that you
19 no longer stand on that position that it should be held off
20 until after the new year and confined to that three-week
21 period.

22 MR. LEE: That would certainly address a large part of
23 our concern. I know that the other defendants joined in our
24 proposal on that point, so I can't speak for all of the
25 defendants, but that would certainly address a big part of our

J5FTSECC

1 concern.

2 THE COURT: Does anyone else wish to speak on the
3 topic of depositions?

4 MR. MORVILLO: Yes, your Honor, Gregory Morvillo.

5 If what we're saying is that party depositions don't
6 take place in the last three weeks, which seems to me to be a
7 tight schedule as well, but we could put them at the end of the
8 depositions. That would be amenable to Mr. O'Rourke, and that
9 might put them out to the end -- or the beginning of the next
10 year. If the deadline for the discovery is April 1st or
11 April 30, whatever it's going to be, there's no reason to take
12 those depositions at the beginning, we should take them at the
13 end when we have had an opportunity -- all the defendants have
14 had an opportunity to see everything and know everything.

15 The SEC knows everything. They have had the
16 opportunity to talk to people and interview people. They did
17 this whole investigation. We are behind the eight ball at this
18 point. We have nothing except the complaint. So putting our
19 clients at the end, particularly in light of the fact that
20 there's a criminal investigation in San Francisco into the very
21 allegations that has been ongoing, makes sense and is
22 protective of my clients, so I would like to put our clients at
23 the end of process. It doesn't have to be in a three-week
24 period, but wherever the end is, that's where they should be.

25 THE COURT: I don't know about this San Francisco

J5FTSECC

1 investigation. Does anyone have any insight they could share
2 with the court?

3 MR. MORVILLO: There is a criminal investigation, my
4 understanding was a dual investigation with the SEC and San
5 Francisco, although I wasn't privy to it, obviously. And the
6 SEC charge, San Francisco continues to investigate, my
7 understanding is they now have a cooperating witness and things
8 have slowed down. There were tolling agreements in place,
9 those have it expired, but my understanding is the cooperating
10 witness, who is among the defendants in this group, I believe,
11 has started to cooperate, and there may be a criminal case
12 coming down the pike reasonably shortly.

13 If that's the case, and one or more of our clients get
14 indicted, you can bet we'll be back asking for a full stay.
15 But in the meantime, while San Francisco drags its feet on
16 this, we don't think it's appropriate for the SEC to act as a
17 stalking horse for the U.S. Attorney's Office. I'm not
18 suggesting that that is what they would want to do, I'm not
19 suggesting that's what the plan is or I mean to cast no
20 aspersions on Ms. Brown and the SEC, I just want a situation to
21 evolve where my client is potentially under investigation and
22 the SEC is taking his deposition and he is forced either to
23 take the Fifth or give it, and then they give the deposition to
24 San Francisco. So I would like to avoid any of these
25 possibilities if we can.

J5FTSECC

1 THE COURT: Okay.

2 MS. BROWN: Your Honor, may I be heard on that last
3 point?

4 THE COURT: Absolutely.

5 MS. BROWN: I'm sorry to interrupt. I hoped that one
6 of the defendants would offer to the Court the information that
7 there is a parallel criminal investigation. It's not a dual
8 investigation, it's a parallel investigation.

9 Because I think what defendants are trying do here,
10 and particularly by putting the depositions of the parties at
11 the end, is to get all the benefits of discovery and have none
12 of the obligations of discovery. For example, you will see in
13 the 26(f) report that was filed with the Court there's a
14 reference to my request that the defendants let us know if they
15 will assert an active production privilege, because if they
16 are, it seems to us completely unfair that we would have to
17 turn over documents and yet the defendants would rely on their
18 active production privilege to withhold documents from us.

19 So I am happy to proceed with discovery. I told
20 defendants that, they attached one of my emails which said I
21 was happy to proceed with document discovery, but I don't think
22 it's fair for us to be the only providers of discovery and the
23 defendants could sit back and enjoy the benefits of that.
24 That's just not the way that litigation is conducted in this
25 district.

J5FTSECC

1 THE COURT: But you have issued the requests for
2 production of the documents to defendants, correct?

3 MS. BROWN: Yes.

4 THE COURT: And I take it that you have not heard as
5 of yet whether or not they intend to interpose any privilege.

6 MS. BROWN: Correct, I have not.

7 THE COURT: Okay. Does anyone wish to make a
8 statement on the record as to whether they will or will not be?
9 Not holding you to it.

10 MR. RICHARD: Your Honor, Dennis Richard for
11 Mr. Brauser.

12 We're not prepared to make a definitive statement,
13 however, we do not believe we will be asserting an active
14 production privilege. And given that, if there is one or two
15 or three defendants that do not, what we're looking for here --
16 the parties have exchanged initial disclosures just days ago --
17 is to go ahead and exchange initial disclosures even before the
18 response date of -- this has pending for a long time, of the
19 production requests.

20 The SEC has their investigative files that we would
21 like to see. They asked us if we'll produce emails. We would
22 like to exchange so that there isn't any: You got it, you
23 didn't. And we would like to do that next week or the week
24 after just so we can get this under way, and by then we'll know
25 and be able to confirm we're not asserting any type of

J5FTSECC

1 production privilege.

2 MR. FEE: Briefly, your Honor, Adam Fee. Just on the
3 last point Ms. Brown made, Mr. Stetson individually I think is
4 still not yet ready to announce his position. There are
5 entities here that could not assert an active production
6 privilege and will not, at least speaking for ourselves.

7 Just with respect to her last point about the
8 unfairness, I think was the word she used, an invocation and
9 one side producing discovery. There is relief the SEC has,
10 obviously, if Mr. Stetson chooses to invoke his Fifth Amendment
11 rights, and that's an adverse inference that the judge could
12 instruct the jury about. I don't think there is case law that
13 would necessarily support the position that the SEC does not
14 need to produce to defendants who choose to invoke. I don't
15 know that she's saying, but I just want to clarify that there
16 is relief available, it's not stopping production.

17 MS. BROWN: Actually there is precedent. Judge Pauley
18 in this district issued an order that required all defendants
19 to participate in discovery who wanted discovery from the SEC
20 in a case that was pending and a parallel criminal
21 investigation was proceeding. So there is precedent for that,
22 and it makes sense to me -- I wonder, if we're not sure about
23 the document production, if we could at least set a date by
24 which the defendants' depositions could go forward.

25 THE COURT: Well, could I ask you, Ms. Brown, are you

J5FTSECC

1 able to make some estimate of how voluminous the discovery will
2 be?

3 MS. BROWN: Yes. So the number I have, and I checked
4 this morning, is that we have about a million documents to
5 produce, slightly over that, but I will say that's not entirely
6 indicative of what we have available because at least half of
7 those documents are actually operating system files, et cetera,
8 that we obtained from a hard drive that was produced to us by
9 the ex-husband of a former MGT Investment employee.

10 THE COURT: Okay.

11 MS. BROWN: So I don't think 1.2 really sort of gives
12 you a picture.

13 THE COURT: So you think it's substantially fewer than
14 1.2 million.

15 MS. BROWN: I would say about 600,000 documents.

16 MR. MORVILLO: Do you think we could get the estimate
17 of page number? One page, that's fine, it's a 50-page
18 document, that's entirely different.

19 MS. BROWN: That's something that I don't have
20 available.

21 THE COURT: So 600,000 documents. Would you be in a
22 position to provide some guidance or index to the defendants as
23 to what documents pertain to what entities or individuals?

24 MS. BROWN: The way our documents are produced, your
25 Honor, is they come with all sorts of metadata information that

J5FTSECC

1 allow defendants and anyone, including me, to review the
2 documents with that kind of information. So for example, one
3 of the things that is provided is the producing party. So if
4 the producing party is MGT, then you can sort the production by
5 just those documents produced by MGT. They're all fully
6 searchable. So if there is a particular word you want to
7 search, you can search that. They're searchable by date,
8 they're searchable by Bates number, they're searchable in any
9 number of different ways that provides a user with information
10 about the source, the date.

11 THE COURT: And they're electronic, all these
12 documents?

13 MS. BROWN: Yes.

14 THE COURT: And will you be able to produce your files
15 within the 30 days that you received the request?

16 MS. BROWN: We're working on it.

17 THE COURT: Okay. So let me ask the parties --

18 MR. MORVILLO: Sorry, Judge, I wanted to clarify, is
19 that a "no" on the index? I think you asked whether there was
20 an index that will be provided to us, and we got, "they're
21 searchable terms." I'm just trying to get an answer to that
22 question.

23 THE COURT: I think that was a "no," but Ms. Brown?

24 MS. BROWN: I don't know what he means by "index." We
25 can print out the screen shot of who the producing parties are,

J5FTSECC

1 if that would be the useful.

2 MR. MORVILLO: That was the Court's word, I was just
3 using what you asked for, and --

4 THE COURT: I don't think you're going to get a
5 document that says these documents pertain to your client and
6 these documents pertain to others, but it sounds like they're
7 fully searchable, so that should help substantially.

8 Let me ask the parties, if the document discovery
9 proceeds on the current schedule, 30 days from date of
10 production or something close to that, when does it make sense
11 to schedule depositions? Because obviously I want to give
12 everyone an opportunity to review the documents. I don't think
13 it has to be until next January, but something early fall,
14 September, maybe?

15 MS. BROWN: I was thinking right after Labor Day, your
16 Honor.

17 THE COURT: That seems to make sense to me. So why
18 don't we do that, why don't we start depositions first week of
19 September after Labor Day.

20 And with respect to the written discovery,
21 interrogatories, et cetera, I am inclined to proceed under the
22 local rule. I know Mr. Lee has pointed out to me that I have
23 allowed parties to stray from that rule on a couple of
24 occasions, but that's two or three of several thousand cases
25 that I presided over. The rule seems to work just fine. And

J5FTSECC

1 obviously, everyone still needs to get their feet wet with
2 respect to -- at least on the defense side, with respect to the
3 discovery. I wouldn't want parties to prematurely put any
4 position on the line that they would have to change later on.
5 So we will abide by the Local Rule 33.3.

6 I think that takes care of the discovery issues. Is
7 there a controversy concerning April 1 versus April 30?

8 MS. BROWN: Yes.

9 MR. LEE: Your Honor, we proposed April 30. We
10 believe given the number of parties, number of claims, number
11 of documents, whether 600,000 documents or a million documents
12 it will be a multiple of that in terms of pages. We propose
13 April 30.

14 THE COURT: That makes sense. That's reasonable. So
15 the cut-off for discovery will be April 30.

16 MR. LEE: Your Honor, just to clarify with respect to
17 the local rule, does the Court's ruling apply to requests for
18 admission as well?

19 THE COURT: Yes. By the way, these are the deadlines
20 now, but from my perspective, as long as we keep the April 30
21 date, if you guys agree among yourselves to move those dates
22 one way or the other, that does not matter to me. You are free
23 to do that on consent.

24 MS. BROWN: I think we will have to because I know the
25 April 30 date does to the interim dates, so we'll have to

J5FTSECC

1 confer and figure that out.

2 MR. LEE: One more question or clarification, all of
3 this, I think at least in terms of our ability to be prepared,
4 assumes that the SEC will be producing their documents if not
5 on the 30th day very close to 30th day. I know Ms. Brown said
6 they're working on it. That was somewhat vague, from our
7 perspective.

8 THE COURT: Yes, somewhat vague, but again, I'm
9 assuming that they will produce it within 30 days or sometime
10 shortly thereafter. If any of these dates become a problem and
11 you need to come back to me, just come back to me. Okay?

12 And with that guidance, can I ask the parties to
13 prepare a final version of the discovery schedule that I could
14 sign off on?

15 MR. LEE: Yes, your Honor.

16 MR. MORVILLO: Did you decide when the parties are
17 going to be deposed amid the depositions?

18 THE COURT: Well, depositions can start in the fall,
19 and if the parties are ready to be deposed the parties could be
20 deposed. If they notice your client, presumably they could be
21 deposed. I am not going to put them off at the end.

22 MS. BROWN: Thank you, your Honor.

23 THE COURT: By the end of the day today, business
24 today, you can submit that final discovery order.

25 Anything else that we need to do? Sir?

J5FTSECC

1 MR. RICHARD: Yes, your Honor. The Court recently
2 adjourned the briefing schedule on motions to dismiss with
3 motions due on June 19, and the order actually says shall be
4 filed on June 19, and then another part said by. And the
5 reason I'm asking this question is because my client at least
6 wants to put his position on the record publicly through a
7 motion to dismiss, and if we filed it earlier, I understand
8 that they don't have to respond until a month later.

9 THE COURT: You're free to file it today.

10 MR. RICHARD: Thank you.

11 THE COURT: Okay. Unless there's anything else, we're
12 adjourned.

13 (Adjourned)
14
15
16
17
18
19
20
21
22
23
24
25